Supreme Court, U.S.
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No. 92-636

In The
Supreme Court Of The United States

October Term, 1992

CONNIE B. DILLNER,
Petitioner,

v.

RICHARD A. SODEN,
Respondent.

Petition For Writ of Certiorari
To The Supreme Court Of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Kansas Expedited Child Support Enforcement Statutes authorize the promulgation of rules for the enforcement and modification of child support orders. The questions presented are:

1. Does due process allow the State of Kansas to delegate to an Administrative Hearing Officer full power to hear or decide child support controversies without providing litigants either recording or transcribing the hearing for appeal purposes?

2. If so, can the State of Kansas deny **de novo** review of such decisions by a judge, as is allowed other civil litigants?

3. May the State of Kansas require child support litigants to pay for court reporters when all other civil litigants are not required?

PARTIES TO THE PROCEEDING

The parties set forth in Petitioner's Brief are accurate.

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OPINIONS BELOW

The opinions as cited by Petitioner are accurate.

SERVICE ON RESPONDENT

Respondent received service of Petitioner's Petition for Writ of Certiorari by United States mail on October 20, 1992. This Brief in Opposition is filed within the statutory 30 days allowed.

PETITIONER'S APPENDIX DOCUMENTS

Petitioner's Appendix on page b7 included the Administrative Hearing Officer's (AHO) Order, however, she failed to note in paragraph 3 that the AHO crossed out (is not). The AHO found a substantial change in circumstances that warranted a child support obligation modification.

Additionally, Petitioner included Shawnee County Family Law Guidelines 4(D.), 4.05 and 4.06. Guidelines 4.05 and 4.06 were not adopted at the time of the Soden hearing and are not applicable to these proceedings. There was no requirement that a litigant pay for a court reporter if the litigant wanted a transcript.

This mandates that the third question raised by Petitioner be denied.

JURISDICTION

There are no inconsistent decisions that would confer jurisdiction on this court. There was no deprivation of due process, and no deprivation of equal protection to Petitioner at the AHO hearing.

STATEMENT OF THE CASE

The parties to this action were divorced on May 26, 1989. Mr. Soden filed a Motion for Modification of Child Support on February 1, 1991.

A hearing on the Motion was held before the Administrative Hearing Officer (AHO) on April 16, 1991 pursuant to the Kansas Expedited Judicial Process (Kansas Supreme Court Rule 172 and Shawnee County Rule 3.401 on pp. d5-d7 of Petitioner's Brief); the Order was entered on May 15, 1991. In the AHO's handwritten notes from the hearing, she stated: "After an

extensive hearing and wading through 2 depositions and numerous submitted documents, the AHO finds...." (Appendix A). The Order reduced child support to $862 per month commencing May 5, 1991.

Petitioner filed a Petition for Judicial Review on May 24, 1991. The Judicial Review was heard on June 26, 1991. Judge Buchele issued a letter decision on June 28, 1991, which was journalized by Order filed July 29, 1991. Judge Buchele's Order affirmed the AHO Order, however, the date of payment was modified to commence June 5, 1991.

From this judgment, Petitioner appealed the matter to the Kansas Supreme Court where the lower court's decision was affirmed on May 22, 1992. It is from the Kansas Supreme Court decision that Petitioner comes to this Court.

RESPONSE TO PETITIONER'S FACTS

Petitioner Dillner has submitted an inaccurate, incomplete account of the facts.

The majority of the alleged facts Petitioner enumerated in her brief are not accurate, however, since most predate the divorce, Mr. Soden will not use his valuable briefing for those items, or other facts not related to the Expedited Judicial Process, as they should have no bearing on this proceeding.

Mr. Soden never threatened to quit his employment for six months as alleged on page 11 of Petitioner's Brief. All allegations as to what Mr. Hunter would have said (Vol. I, p. 178) are completely false. (Petitioner's Brief p. 13)

Petitioner's legal issues have changed at every level to which she has appealed.

She did not claim that delegation of authority to the AHO was unconstitutional. She did not allege that the expedited process was unconstitutional.

The first time Petitioner raised as error the issue of the delegation of authority to the

AHO for child support decisions was in her Docketing Statement in her Appeal to the Kansas Supreme Court.

In her Kansas Supreme Court Brief Petitioner listed her appeal issues as:

> I. The trial court unconstitutionally delegated the full power to hear the child support controversy to an Administrative Hearing Officer, denying remedy by due course of law, due process and equal protection
>
> II. The trial court improperly limited Respondent's time to present witnesses

In her Kansas Supreme Court Reply Brief she raised the issue of:

> Improper Limitation Of
> Respondent's Witnesses

Now, Petitioner focuses on the lack of a court reporter's transcript. She asks this court to grant her a writ of certiorari to determine:

> Whether the expedited Child Support Enforcement Procedures instituted by the State of Kansas and the Third Judicial District (Shawnee County) violate the Fourteenth Amendment to the United States Constitution.
>
> and

> Whether due process requires a hearing on the record without request or a **de novo** review by regular judicial procedures before child support due from one spouse to another can be reduced. (Brief pp.4-5)

On page 5 of her Brief, Petitioner quotes K.S.A. 20-164 (1991 Supp.). It should be noted that subsection (g) does not have the word "shall" underlined in the text of the rule.

K.S.A. 20-302b which is quoted by Petitioner (Brief pp. 6, 44), is a statute entitled **"District magistrate judges; jurisdiction, powers and duties; appeals."** This statute has no relevance to the procedures established by the Court for an expedited judicial process in child support matters, it does not pertain to administrative hearing officers, it only covers the district magistrate judges.

The child support was not set at $582.00 (Petitioner's Brief, p. 8), it was set at $862.00.

Petitioner references Vol. II of the transcript to support portions of her Petition using quotes from it as facts. Volume II is a transcript of counsels' arguments before Judge Buchele, it is not evidence.

Petitioner also cites Vol. I, pp. 197-201 which is an Affidavit she attached to her Trial Brief filed with the Court AFTER the June 26, 1991, hearing before Judge Buchele. There was no opportunity to cross-examine her concerning these statements. The Affidavit was admitted over objection. Neither of these should be accepted as facts. Petitioner also cites her deposition that was admitted AFTER she gave testimony in open court. The deposition was admitted over Mr. Soden's objection.

APPEAL

The general rule for appeals is that a reviewing court will not consider an

issue that is not raised below (Johnson v. Kan. Neurological Inst., 240 Kan. 123, 126, 727 P.2d 912 (1986)). An appeal is necessarily limited to the questions from which an appeal is taken (McCarty v. Kansas-Nebraska Natural Gas Co., 270 Kan. 386, 271 P.2d 264 (1954)) and if the question was not raised in the first instance when it could have bene raised, it is deemed waived.

Respondent understands that in constitutional questions, there is a right of appeal if the United States Constitution has been abridged, however, it has not been abridged; Petitioner should be precluded from pursuing these issues.

RESPONDENT'S FACTS

1. The parties were divorced on May 26, 1989. Three children were born to this marriage:

Jason, 9-3-74
Mitchell, 2-8-77
John, 6-11-79

2. At the time of the divorce, Mr. Soden was ordered to pay child support of $1,350.00.

8. The Motion to Modify was heard by the AHO on April 16, 1991, under the Kansas Supreme Court Rule 172, Expedited Judicial Process.

4. Kansas Supreme Court Rule 172 provides for an Expedited Judicial Process in child support modification. The rule specifies that a record be made, it does not require that the record be a court reporter's transcript.

5. Both parties received notice of the AHO hearing, and were allowed to present all the witnesses and evidence they desired. Both parties were aware of the expedited procedure and neither objected to the AHO hearing the matter.

6. The AHO made a record of the hearing (Appendix b attached to Petitioner's Brief, Appendix A) which set

support at $862.00 per month.

7. Appellant's counsel verbally objected to the District Court at the end of the hearing that she was not allowed a **de novo** review from the AHO hearing (Vol. I, p. 341).

8. In her District Court Trial Brief Petitioner stated only that she wanted to present non-cumulative witnesses and wanted to present a full closing argument. Petitioner did not raise the constitutionality of the expedited process, nor the AHO's authority to try the case (Vol. I, 175-183).

9. The issue of delegation of authority to the AHO to hear and decide child support cases was first raised by Petitioner in her Docketing Statement for her appeal to the Kansas Supreme Court.

REASONS FOR DENYING THE WRIT

I. Other State Court Decisions

There is no reoccurring question with far-reaching impact presented in this case. The Kansas rule does not mirror another state's rule, however, it does follow the federal government mandate (45 C.F.R. §303.101) for protecting due process rights of the parties. It is immaterial whether other states provide "much more due process safeguards than Kansas" as alleged in Petitioner's Brief p. 20.

The Kansas Court has decided no question of federal law which conflicts with other state court decisions.

II. Due Process

A fundamental requirement of due process is an opportunity to be heard (US v. Eufracio-Torres, 890 F.2d 266, cert. den. 100 S.Ct. 1306 (1989), Joe Self Chevrolet, Inc. v. Board of County Com'rs

of Sedgwick County, 247 Kan. 625, 802 P.2d 1231 (1990)) at a meaningful time in a meaningful manner.

The due process clause only protects vested rights (Harrison By and Through Harrison v. Long, 241 Kan. 174, 734 P.2d 1155, appeal dismissed 108 S.Ct. 50 (1987)). Child support not due and owing is not a vested right.

All of the Supreme Court cases cited in Petitioner's brief support the requirement of "some form of hearing" "at a meaningful time and in a meaningful manner." Respondent does not dispute this proposition.

The AHO's handwritten notes from the hearing state... "After an extensive hearing and wading through 2 depositions and numerous submitted documents, the AHO finds..." (Appendix A) There can be no doubt that the Petitioner had a hearing at

a meaningful time and in a meaningful manner.

Due process does not guarantee a particular form of hearing, and does not even require an oral hearing (In re A.H. Robins Co., Inc., 107 F.R.D. 2 (1985).

Due process does not require that a court reporter's transcript be made at each hearing. There was no prohibition to the Petitioner requesting that a court reporter record the hearing, as is often done with other domestic motions. There is no explanation as to why she did not request such a record either before, or during the AHO hearing.

Both parties had notice; notice is not the issue here. Petitioner could have requested more time for the hearing before the AHO; she did not.

She is asking this court to grant her an order to allow her to retry her case. She had her day (and days) in court.

Petitioner had a fair hearing before the AHO, she presented all of the evidence that she wanted, even some admitted over the objection of Mr. Soden.

Mr. Soden agrees that the court has established an expedited process to take care of the extremely crowded docket in domestic matters. Supreme Court Rule 172 authorizes the hearing officer to:

> (1) Take testimony and prepare written findings of fact and conclusions of law which shall constitute the summary record. (Rule 172 (b)(1).)

Judge Lindhout prepared written findings and conclusions (Vol. I, 92-97, Petitioner's Appendix b).

The rules do not require a transcript be made of each proceeding, however there is no bar to a request for a transcript.

None of the cases cited by Appellant deals with the issue of a post divorce child support modification, except

Drennen. None of the cases she cited is an appeal from an AHO child support order.

The Drennen case (Drennen v. Drennen, 229 Neb. 204, 426 N.W.2d 252 [1988]) cited by Appellant is distinguishable in many respects. It was a IV-D paternity and child support case. Under Nebraska law, a referee determines the issues only if it is a IV-D case. The statute in Nebraska did not allow the referee to decide child support where IV-D is not involved. The court held the law unconstitutional because of an equal protection violation. The IV-D program applicants in Nebraska were treated differently from applicants not in the IV-D program. All litigants under Kansas' expedited procedure are afforded notice and opportunity to be heard; they have the right to call witnesses, cross-examine witnesses, and present evidence.

At the district court hearing, Mr. Keeshan stated to the court (Vol. II, page 2, lines 18-19), "I'm not sure if the court desires evidence or argument." After the court stated that it was interested in argument, Mr. Keeshan then stated, " . . . we have a procedure which in Shawnee County differs from a lot of other states in that we don't have what we consider, at least from the respondent's viewpoint, is an adequate opportunity to review the case." Questioning the adequacy of the opportunity to review the case, does not raise a constitutional question about the AHO hearing.

III. Equal Protection

It is impossible to determine what fundamental rights Petitioner was denied. She never explains why she did not request a court reporter at the AHO hearing.

Equal protection under the 14th Amendment to the United States

Constitution guarantees only that distinctions be drawn in such a manner as to bear a rational relationship to a legitimate state purpose. A violation occurs when the state treats someone differently who is similarly situated (Jacobs, Visconsi & Jacobs, Co., 927 F.2d 1111, 9th Cir. (1991)).

The mere fact that a statute applies to one person and not another does not constitute a denial of equal protection.

Where the statute challenged does not abridge a fundamental right and does not impose a suspect classification, then the rational relationship to governmental interest is examined (U.S. v. Doyan, 909 F.2d 412, 9th Cir. (1990)).

Since the Kansas Expedited Judicial Process has not been shown to abridge a fundamental right (liberty or vested property right) and does not impose a suspect classification (such as race,

religion or alienage), then the relationship to governmental interest should be examined.

There is a governmental interest in having support modification motions heard in a timely manner. The expedited process accomplishes that goal.

A **de novo** hearing is not allowed all other litigants. The child support procedure is unique, however it does not violate due process, nor equal protection.

The payment for court reporters by litigants should not be a question for determination here since the Guideline was not in effect at the time the Soden hearing occurred.

Should a party be guaranteed a second chance after not presenting their entire case the first time? No. Mrs. Dillner had every opportunity to present all the evidence she wanted to before the AHO. She had every opportunity to request

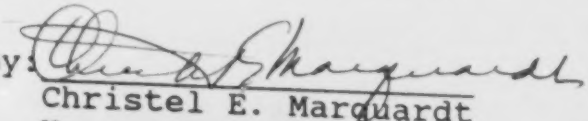
a transcript which she did not do. There was no rule in effect that would have required her to pay for the transcript.

45 C.F.R. §303.101(d)(1) states that testimony should be taken and a record established. In 45 C.F.R. §303.101(c)(2) it mandates that due process rights should be protected and in subsection (6) the parties have the right of review. All due process rights and equal protections were granted Petitioner.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

By: 

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APPENDIX A

"CASE NUMBER: 89 D 325
DATE; 4-16-91

ADMINISTRATIVE HEARING OFFICER'S NOTES;

R wants noted that he believes this hearing a violation of due process because no opportunity for de novo review. So noted. After an extensive hearing and wading through 2 depositions and numerous submitted documents, the AHO finds that the issues are: 1. income of both parties 2. Health insurance payment 3. tax exemptions 4. both parties financial condition. The AHO concludes as follows: 1. P's new salary will be approx. $3000/mo according to documents submitted by P; R earns approx $600+ as a school bus driver - minimum wage would be imputed at $737 - farm income is impossible to determine at this time, as an imputed amount of $700 was used for R. 2. R carries health insurance and has prior to his marriage when his new wife was added to his family plan. $48.00 granted for ins. premium. 3. The tax computations from counsel indicate it would be inappropriate for the P to have all the exemptions or to split them equally. Therefore, AHO orders the tax exemption for the middle child to be taken by the R rather than adding to P's child support obligation since he is claiming a difficult financial situation. 4. both parties claim financial difficulties but each are of their own making and since the divorce. AHO finds it would not be in the best interests of the children to either reduce or increase the c/s ordered due to overall financial condition.

Jane E. Lindhout/s/
JANE E. LINDHOUT
ADMINISTRATIVE HEARING OFFICER"